

89-4250

Supreme Court, U.S.

FILED

SEP 11 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

JAMES CONSTANT

Petitioner,

v.

HITACHI AMERICA, LTD., TEXAS INSTRUMENTS,
INC., ANALOG DEVICES, INC., NEC ELECTRO-
NICS, INC., SPENSLEY HORN JUBAS & LUBITZ,
SHEPPARD MULLIN RICHTER & HAMPTON, HOP-
GOOD CALIMAFDE KALIL & BLAUSTEIN, and
ROBERT HILLMAN,

Respondents.

JAMES CONSTANT,

Petitioner,

v.

MARCIAN HOFF, ROBERT HILLMAN, INTEL, INC.,
TEXAS INSTRUMENTS, INC., BLAKELY, SOKOLOFF,
TAYLOR & ZAFMAN, and MAKER SMITH & MILLS,

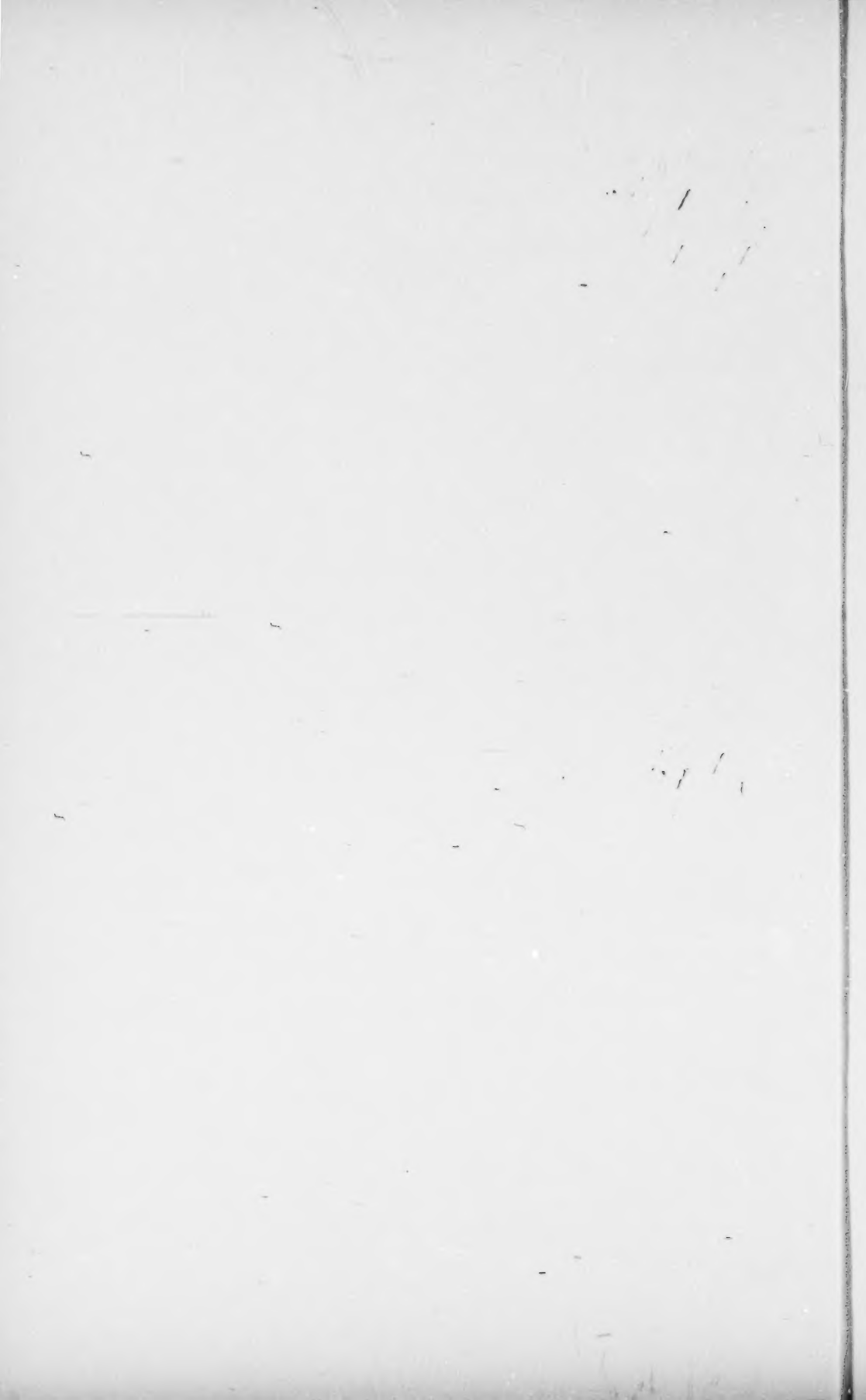
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

James Constant
1603 Danbury Drive
Claremont, CA 91711
(714) 624-1801

Pro se petitioner

52/92



QUESTIONS PRESENTED FOR REVIEW

Whether sanctions under FRCP 11 and FRAP 38 against petitioner are arbitrary because:

1. the fraud complaint and appeal were well grounded in facts (the special master admitted that he was unqualified in any technology and was not qualified to testify under oath; see EXHIBITS) and warranted by existing law (decisions of other federal courts of appeal);

2. the dismissal of the fraud cases against the master and the judge on grounds of absolute immunity is arbitrary in the clear absence of all jurisdiction (the district court cannot perform but can only review the Patent Office function);

3. the retention of jurisdiction by the district court to invalidate petitioner's patents in the earlier patent case, using prior art not considered by the

QUESTIONS CONCERNING THE
RECENTLY ISSUED
THIS IS THE FIRST
NUMBER

1. The first number of the series
will be published in 1911, and
will contain all the material
published up to the end of 1910.
The second number will be published
in 1912, and will contain all
the material published up to the
end of 1911.

2. The third number of the series
will be published in 1913, and
will contain all the material
published up to the end of 1912.
The fourth number will be published
in 1914, and will contain all
the material published up to the
end of 1913.

3. The fifth number of the series
will be published in 1915, and
will contain all the material
published up to the end of 1914.
The sixth number will be published
in 1916, and will contain all
the material published up to the
end of 1915.

Patent Office in granting petitioner's patents, deprives petitioner's due process to obtain a determination of issue under 35 USC 303;

4. the granting of corporate respondent's motions for summary judgement on grounds of res judicata and collateral estoppel is arbitrary because different claims and issues were involved in the fraud and earlier patent cases;

5. in the absence of the same claims and issues in the fraud and earlier patent cases, the application of res judicata and collateral estoppel deprive petitioner's liberty and property without due process of law;

6. the decisions of other federal circuits, and the applicable decisions of this Court, support petitioner's position (both the Congressional policy under 35 USC 302 et seq. and the case law support

petitioner's position, the courts below have failed to show any bad faith on the part of petitioner, sanctions actually assessed are grossly duplicative, unreasonable and do not take into account petitioner's ability to pay);

7. sanctions violate the due process clause because they were made without giving petitioner the opportunity to submit a response to respondent's applications for attorney's fees in the court of appeals; and

8. sanctions deny petitioner's equal protection because FRCP 11 and FRAP 38 treat pro se petitioner and corporate respondents differently.

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1. The first part of the report is a general introduction to the subject of the study.

2. The second part of the report is a detailed description of the methods used in the study.

3. The third part of the report is a discussion of the results of the study.

4. The fourth part of the report is a conclusion and a list of references.

5. The fifth part of the report is a list of appendices.

6. The sixth part of the report is a list of figures and tables.

7. The seventh part of the report is a list of footnotes.

8. The eighth part of the report is a list of references.

9. The ninth part of the report is a list of appendices.

10. The tenth part of the report is a list of figures and tables.

11. The eleventh part of the report is a list of footnotes.

12. The twelfth part of the report is a list of references.

13. The thirteenth part of the report is a list of appendices.

14. The fourteenth part of the report is a list of figures and tables.

15. The fifteenth part of the report is a list of footnotes.

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Other Authority

J. Romagnoli, "What Constitutes
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THE STATE OF NEW YORK

IN SENATE

January 1, 1901

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

APRIL 1, 1899

ALBANY:

THE STATE PRINTING OFFICE

1901

Price, 10 CENTS

By Order of the Senate,

JOHN W. ALLEN

Secretary of the Senate

ALBANY, N. Y.

JANUARY 1, 1901

RECEIVED

1901

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, James Constant,
respectfully prays that a writ of
certiorari issue to review the order for
sanctions against petitioner of the United
States Court of Appeals for the Federal
Circuit ordered 20 July, 1989 attached as
APPENDIX A-31.

OPINION BELOW

The Court of Appeals for the Federal
Circuit issued its decision attached as
APPENDIX A-2 affirming the order for
sanctions against petitioner of the District
Court of California attached as APPENDIX B.

JURISDICTION

The jurisdiction of this Court is
invoked under 28 USC 1254(1).

REPORT OF THE BOARD OF DIRECTORS
OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

FOR THE YEAR ENDING DECEMBER 31, 1911

The Board of Directors of the United States Court of Appeals for the Second Circuit, organized under the provisions of the Act of March 3, 1907, Chapter 110, Section 1101, has the honor to submit herewith its report for the year ending December 31, 1911. The Board has the pleasure to announce that during the year the Court has continued its work with the same efficiency and economy as in the past. The total number of cases reported to the Court for the year was 1,100, of which 850 were decided. The average number of cases reported per month was 91.7, and the average number of cases decided per month was 70.8. The total number of cases reported for the year was 1,100, of which 850 were decided. The average number of cases reported per month was 91.7, and the average number of cases decided per month was 70.8.

REMARKS

The Board of Directors of the United States Court of Appeals for the Second Circuit, organized under the provisions of the Act of March 3, 1907, Chapter 110, Section 1101, has the honor to submit herewith its report for the year ending December 31, 1911. The Board has the pleasure to announce that during the year the Court has continued its work with the same efficiency and economy as in the past. The total number of cases reported to the Court for the year was 1,100, of which 850 were decided. The average number of cases reported per month was 91.7, and the average number of cases decided per month was 70.8. The total number of cases reported for the year was 1,100, of which 850 were decided. The average number of cases reported per month was 91.7, and the average number of cases decided per month was 70.8.

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STATEMENT OF THE CASE

Judge Wilson, over petitioner's objections, appointed a patent lawyer as special expert to make recommendations on the validity of petitioner's two patents in the earlier patent case. Prior to his appointment, the special expert, Mr. Hillman, admitted having no technical qualifications in any technology and admitted that he was not qualified to testify as a technical expert. Mr. Hillman made two technical reports and testified twice under oath as a technical expert recommending that petitioner's two patents were invalid. Based on Hillman's technical reports and testimony, Judge Wilson found the two patents invalid (A-15). The court of appeals specifically affirmed that "Hillman was well qualified" (A-21).

Petitioner filed four lawsuits (the fraud cases) against the special

STATEMENT OF THE CASE

That the following facts are true:

1. That the following facts are true:

2. That the following facts are true:

3. That the following facts are true:

4. That the following facts are true:

5. That the following facts are true:

6. That the following facts are true:

7. That the following facts are true:

8. That the following facts are true:

9. That the following facts are true:

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11. That the following facts are true:

12. That the following facts are true:

13. That the following facts are true:

14. That the following facts are true:

15. That the following facts are true:

16. That the following facts are true:

17. That the following facts are true:

18. That the following facts are true:

19. That the following facts are true:

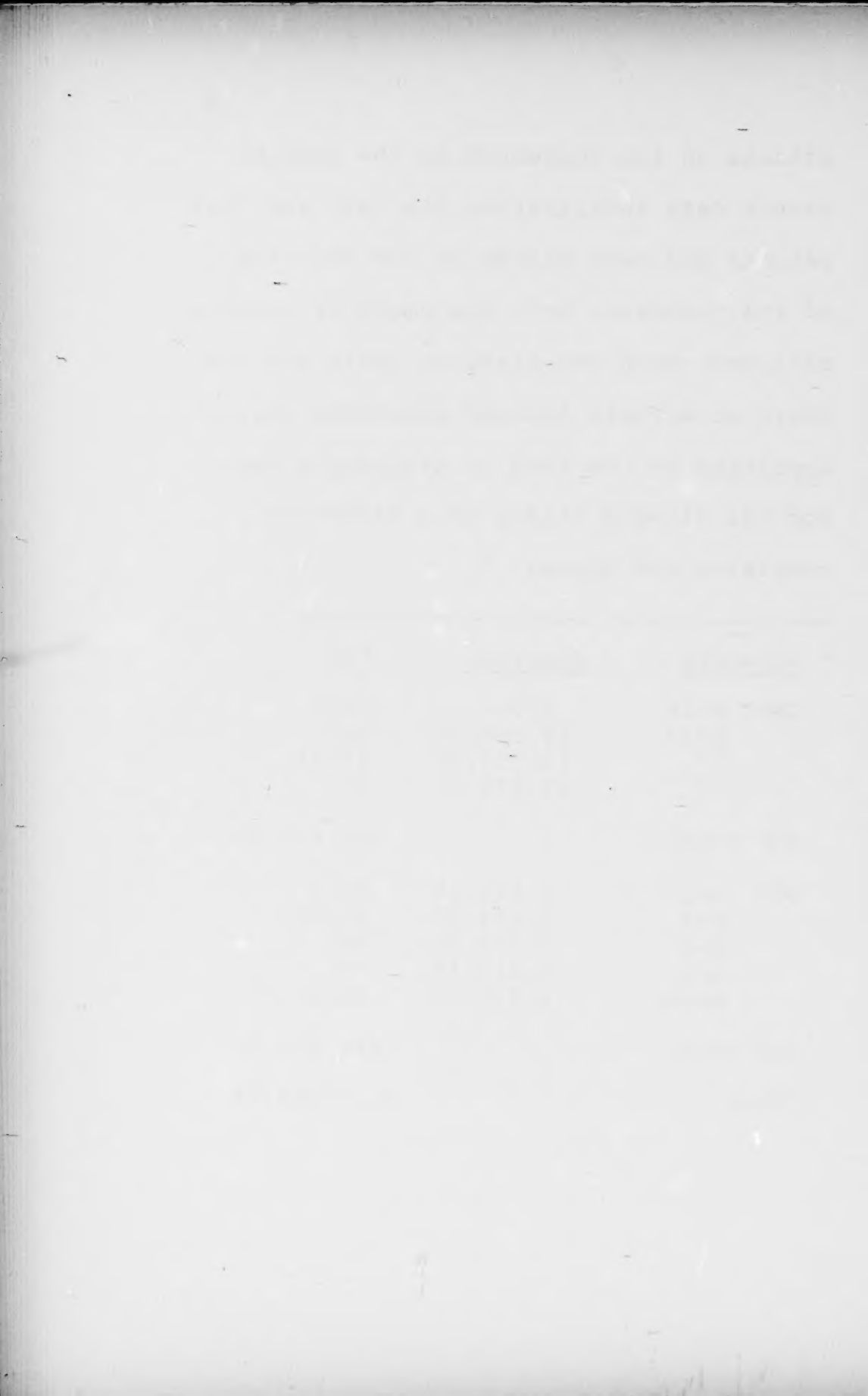
20. That the following facts are true:

master, the judge, some attorneys, and some defendants in the earlier patent case. The issues were fraud in the procurement of the judgement and a variety of tortious activities such as misrepresentation, injurious falsehood, and interference with property and contract rights. A-5,6. Mr. Hillman was named as a defendant in each case. The four cases arise from the fact that Mr. Hillman admitted that he was not qualified in any technology and that this fact was known to Judge Wilson and to the other parties before Hillman was appointed as special master in the patent case. The fraud cases were considered together. A-7.

The district court dismissed the cases against the master and the judge on grounds of absolute judicial immunity. The district court granted summary judgement in favor of the remaining defendants on grounds that the fraud cases were impermissible collateral

attacks on the judgement in the earlier patent case invalidating the '491 and '635 patents and were barred by the doctrine of res judicata. A-7. The court of appeals affirmed. Both the district court and the court of appeals imposed sanctions against appellant in the form of attorney's fees for his alleged filing of a frivolous complaint and appeal. *

* <u>Appendix</u>	<u>Sanction</u>	<u>For</u>
CAFC A-29	2,000	CAFC
A-33	18,303.35	HAL
"	12,707.50	Intel
"	25,626.08	TI
Sub-total		\$58,636.93
DCT B-2	9,694.10	TI
B-4	7,394.50	AD/NEC
B-6	7,298.75	HAL
B-8	16,016.16	TI
B-10	4,425	Intel
Sub-total		\$44,828.51
Total		\$103,465.36



REASONS FOR GRANTING THE WRIT

The issues are whether the complaint and appeal were frivolous and, if so, whether sanctions were fair.

1. Fraud

Petitioner's charge of "fraud" is based on his view that Mr. Hillman was unqualified to serve as a special master-expert, that Hillman knowingly testified as a qualified expert, that Judge Wilson and the other defendants in the patent litigation knew that Hillman was unqualified, that Judge Wilson allowed Hillman to write technical reports and to testify under oath as a technical expert, and that Judge Wilson used Hillman's technical reports and testimony to invalidate petitioner's patents. As evidence, petitioner introduced two letters by Hillman to defendant's counsel in the patent case and a letter from that counsel to

Judge Wilson before Hillman's appointment as master (Complaint Exhibits B,C,D; also in Petition for Rehearing in Banc) (hereinafter EXHIBITS).

Expertise for legal purposes means that a witness has sufficient specialized knowledge, skill, expertise, training or education to testify in the form of an opinion. Fed. Rules of Evid. 702. As shown in EXHIBITS, Hillman admits "I do not have expert qualifications in this or any other technology" and "I would not be qualified to testify as a technology expert". Yet Hillman did just that and Judge Wilson used Hillman's reports and testimony to invalidate petitioner's patents.

While the district court has wide discretion in determining when a purported expert is sufficiently qualified to take the stand and render an opinion in a

Judge Wilson before Wilmer's appointment

sent as master (Comptroller Exhibit E, C, D)

also in position for Rehearing in E and

Rehearing Exhibit E.

Exhibits for legal purposes were

that a witness has sufficient qualifications

knowledge, skill, experience, training or

education to testify in the form of an

opinion, for, under the rules of evidence

shown in Exhibit E, Wilmer should be

not have expert qualifications in this or

any other technology, and I would not be

qualified to testify as a witness.

Expert? Yet Wilmer did not know and

Judge Wilson and Wilmer's report and

the report of the Rehearing Exhibit E.

Exhibits

While the Rehearing Exhibit E was

discussed as relevant and a qualified

expert is sufficiently qualified to testify

the state and under the opinion in E

certain area, there are limits to that discretion; and a person lacking qualifications in the pertinent art, in patent cases, for testifying as to what would or would not have been known to one of ordinary skill in the pertinent art, should not be allowed to express an opinion. Forbro Design Corp. v. Raytheon Co., 190 USPQ 49 (CA 1 1976). A patent speaks to its art and what it says can be told in complicated cases only by one skilled in the art. Nyyssonen v. Bendix Corp., 342 F2d 531, 144 USPQ 555 (CA 1 1965) (citing B.F. Sturtevant Co. v. Massachussets Hair & Felt Co., 122 F2d 900, 51 USPQ 198, CA 1 1941, cert. den. 315 US 823, 52 USPQ 644, 1942).

Clearly, the court of appeal's finding that "Hillman was well qualified" (App. A-21) is not supported by the evidence in EXHIBITS. Equally clear, Hillman does

1. Mr. J. Edgar Hoover, Director, Federal Bureau of Investigation, Washington, D.C.
 2. Mr. Clegg, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 3. Mr. Glavin, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 4. Mr. Ladd, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 5. Mr. Nichols, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 6. Mr. Rosen, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 7. Mr. Tracy, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 8. Mr. Carson, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 9. Mr. Egan, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 10. Mr. Gurnea, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 11. Mr. Hendon, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 12. Mr. Pennington, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 13. Mr. Quinn, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 14. Mr. Nease, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.
 15. Mr. Gandy, Chief of Bureau of Investigation, Federal Bureau of Investigation, Washington, D.C.

not qualify as a court appointed expert under Fed. Rules of Evid. 702, And, the court's finding is in clear conflict with the foregoing opinions in the 1st Circuit. As it stands, the court's decision would allow any patent lawyer who admits lacking qualifications in any technology to write technical reports and to testify on and defeat a United States patent.

From the foregoing, it is clear that the complaint and appeal were well grounded in their facts (EXHIBITS) and warranted by the existing law (1st Circuit and Supreme Court authorities cited above). The sanctions therefore, imposed by the courts below, have no grounds in either FRCP 11 or FRAP 38. Rather, the cases against the master and judge were dismissed on grounds of absolute judicial immunity and summary judgement was granted to corporate defendants on grounds of res judicata and collateral estoppel. These grounds are arbitrary and capricious.

2. Judicial Immunity

The doctrine of judicial immunity is meant to protect only judicial acts, which, by definition are acts requiring judicial discretion. When a judge does not exercise judicial discretion, the policies supporting absolute immunity disappear. While an administrative or executive act (here for the reexamination of patents based on references not considered by the Patent Office) requires a degree of discretion, it is not judicial discretion merely because the actor is a judge. Judicial immunity therefore should not be granted to such exercising of discretion. J. Romagnoli, "What Constitutes a Judicial Act for Purposes of Judicial Immunity?" 53 Ford. L.R. 1503 (hereinafter ROMAGNOLI), 1513 notes 74-79 and accompanying text.

The reexamination of petitioner's patents is not a function normally performed by judges only and not by administrators or executives. Id 1512. Indeed the main responsibility for such functions has been committed by Congress to the Patent Office. 35 USC 302 et seq. Moreover, while the district court has the power to review the act of granting petitioner's patents based on the record before the Patent Office, it only performs an administrative or executive act when it determines the validity of a patent based on references not considered by the Patent Office in granting petitioner's patents. The decision therefore to invalidate petitioner's patents, based on references not considered by the Patent Office, is an administrative or executive act not a judicial act. In the absence of a record in the

The responsibility of petitioner's

patents is not a question usually con-

sidered by judges, and not by adminis-

trators or examiners. In 1872, indeed,

the main responsibility lay upon Congress

and was exercised by Congress in the

Patent Office. It was not until 1877

while the district courts had the power to

review the act of granting petitioner's

patents based on the record before the

Patent Office, it only reviewed an appeal

from the district court when it determined

the validity of a patent issued or refused

not considered by the Patent Office.

Generally, petitioner's position in the

case is as follows: petitioner's

patent, being a patent, was not

valid in the Patent Office, as an adminis-

trative or quasi-judicial act, and not a

judicial act, and the result is the

Patent Office, there is a clear absence of all jurisdiction to reexamine appellant's patents.

In affirming the district court's decision to invalidate petitioner's patents, the court of appeals ruled that

"There is no legal authority for the view that the court must first determine that the prior art in the evaluation of obviousness is more pertinent than the prior art considered by the PTO". Constant v. Advanced Micro-Devices, Inc., 7 USPQ2d 1057, 1065 (Fed. Cir. 1988).

However, this opinion contravenes the purpose for enactment by Congress of 35 USC 302 et seq. which provides in great detail the administrative procedure for the reexamination of patents.

Patent Office, there is a clear statement

of all jurisdiction to examine agents.

Local Agents

is attending the district court

decided to issue a writ of habeas corpus

patents, the court is equally valid that

there is no local jurisdiction

for the year with the court

and other decisions that the

year 1871, the jurisdiction

is determined by the patent

and the court is authorized

to issue a writ of habeas corpus

and the court is authorized

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to issue a writ of habeas corpus

From the foregoing it is clear that the district court's act of reexamination of petitioner's patents, based on references not considered by the Patent Office, is an administrative or executive act which while involving a degree of discretion is definitely not a judicial act merely because the actor was the judge. Because the doctrine of judicial immunity is meant to protect only judicial acts, acts normally performed by judges only, judicial immunity disappears. The dismissal therefore of the complaint on grounds Hillman and Judge Wilson are protected by judicial immunity is without merit.

In Stump v Sparkman, 435 US 349 (1978) this Court held that a judge will remain absolutely immune from a damage suit if he acted within his jurisdiction, or even in "excess of his jurisdiction",

but not in the "clear absence of all jurisdiction" (Id 356-57 quoting Bradley v Fischer, 80 US (13 Wall) 335,351 (1872)) and the act he performed was a "judicial act" (Id 360). The Court developed a two-factor test for determining whether a judge's act is a "judicial" one (Id 362). The first factor -whether the act was a function normally performed by a judge - relates to the "nature of the act itself" (Id 362). The second factor - whether the parties dealt with the judge in his official capacity - looks to the "expectations of the parties" (Id 362). The first factor means a function normally performed by judges only and not by administrators or executives or legislators. See Justice White's statement in the majority opinion "Because Judge Stump performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit

Court Judge, we find no merit to respondent's argument . . . that his action (was) nonjudicial and deprived him of his absolute immunity" (underlines added).

Id 362-63.

In applying the two-factor test Stump, supra to the earlier patent case, the function of the reexamination of issued patents is performed by the Patent Office under 35 USC 302 et seq. Moreover, while respondents opposed, petitioner recommended the low cost Patent Office procedure under 35 USC 302 et seq. to the district court. See transcript for hearing 5 May, 1986 p 9 line 9 through p 11 line 8 and p 13 lines 14-24. Exhibit B (Docket Number = DN 726 in patent case). A-3 to A-5. Clearly, the "expectations" of petitioner were not to deal with the judge in his official capacity but to have the reexamination of his patents

made by the Patent Office. Because Judge Wilson performed the type of act which Congress has assigned to the Patent Office under 35 USC 302 et seq. and because he did so in the clear absence of all jurisdiction, his action was non-judicial and deprived him of his absolute immunity". Id 362-363,

But even if the district court had jurisdiction to perform the Patent Office function under 35 USC 302 et seq., for the reexamination of petitioner's patents based on references not considered by the Patent Office (distinct from references considered by the Patent Office), the circumstances dictate that exhaustion of the administrative remedy should be required. See Dutcher v. Smith, 693 F2d 79,80 (CA9 1982): Adler v. US, 134 Ct Cl 200,202 (1956) (must exhaust even though exhaustion not mandatory). Exhaustion is required here because respondents may vindicate their rights at the administrative

level, thus making court intervention unnecessary. See McKart v. US, 395 US 185, 195 (1969); see also Ainsley v US, 8 Ct Cl 394,399-401 (1985). Exhaustion is also required because the costs of litigating patents are high (costs in the patent case of \$123,832 were taxed against petitioner including the master's fee of \$85,598 after 3 year litigation) compared to costs of obtaining a determination of issue under 35 USC 303 in the Patent Office (\$1,770 for each patent with a determination of issue in 3 months).

In the absence of a determination of issue under 35 USC 303, the retention of jurisdiction by the district court to invalidate petitioner's patents, using prior art not considered by the Patent Office, deprives petitioner's due process. The due process clause entitles petitioner to a

level, this being our intervention
 necessary. See Wright v. Wright, 1952 WL 125.
 195 (1952) and also Wright v. Wright, 52 Cl.
 194, 195-200 (1952). Evidence is also
 required between the facts of litigation
 parties are also found in the present
 case of 215,121 were cited against the
 court finding the matter's law of
 245,265 also a case (1952) compared
 to those of 215,121's relationship in
 same order 25 and 101 on the same claim
 151,110 for each matter with a finding
 that it was in a matter.
 In the absence of a determination of
 issue under 25 and 101, the court will
 proceed to the matter's law of
 evidence. Evidence's relationship with 215
 and 245,265 is the same. The
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hearing on the merits so that he can prove that, in fact, the prior art used by the district court to invalidate petitioner's patents is not more pertinent than the prior art considered by the Patent Office in granting petitioner's patents. See Constant, supra citation at p 11. Forcing petitioner to give up his patents by irrebutably presuming that the prior art considered by the district court in its evaluation of petitioner's patents is more pertinent than the prior art considered by the Patent Office deprives petitioner's liberty and property without due process of law. Vlandis v. Kline, 412 US 441 (1973); Cleveland Board of Education v. LaFleur, 414 US 632 (1974); Coleman v. Darden, 595 F2d 533 (CA10 1979), cert den 100 S Ct 267, 444 US 927, 62 LEd2d 184 (Statutes creating permanent irrebutable presumptions are disfavored under the 5th and 14th Amendments, because they preclude

individualized determinations of fact upon which substantial rights or obligations may depend). Here, the court of appeals does not follow the policy enunciated by Congress in 35 USC 302 et seq. and affirms the district court's power to invalidate patents using prior art not considered by the Patent Office. Id., supra citation at p 11.

The dismissal therefore of the fraud cases against the master and judge on grounds of absolute immunity is arbitrary and capricious in the clear absence of all jurisdiction (the district court cannot perform but can only review the Patent Office function under 35 USC 302 et seq.). The retention of jurisdiction by the district court to invalidate petitioner's patents, using prior art not considered by the Patent Office, deprives petitioner's due process to obtain a determination of issue under 35 USC 303.

3. Res Judicata/Collateral Estoppel

Under the doctrine of res judicata (claim preclusion) the entry of a final judgement "on the merits" of a claim, (i.e., cause of action) in a proceeding serves to preclude the litigation of the same claim in a subsequent proceeding between the parties or their privies. See Lawlor v National Screen Service Corp. 349 US 322, 75 S Ct 865, 97 L Ed 1122 (1955); Chromalloy American Corp. v Kenneth Gordon Ltd., 736 F2d 694, 222 USPQ 187 (CAFC 1984); Flowers Industries, Inc. v Interstate Brands Corp., 5 USPQ2d 1580 (TTAB 1987). Inasmuch as the fraud claims and some parties (master, judge, attorneys) in fraud cases were different from the patent claims and parties in the earlier patent case, there can be no bar by reason of res judicata. Moreover, the

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defense of invalidity (35 USC 282) of the two patents is not a claim (i.e., cause of action) to bar the fraud cases under res judicata.

On the other hand, the doctrine of collateral estoppel (issue preclusion) serves to preclude the relitigation, by the same parties or their privies, of issues actually litigated, and necessarily determined by a court of competent jurisdiction, in a prior proceeding, whether or not the prior proceeding involved the same claim as the subsequent proceeding. Lawlor, Chromalloy, supra. See also Mother's Restaurant, Inc. v Mama's Pizza, Inc., 723 F2d 1566, 221 USPQ 394 (CAFC 1983); International Order of Job's Daughters v Lindeburg & Co., 727 F2d 1087, 220 USPQ 1017 (CAFC 1984). Because the fraud cases were not actually litigated, and



necessarily determined by a court of competent jurisdiction, and because some parties in fraud cases were different from the parties in the earlier patent case, there can be no bar by reason of collateral estoppel.

The fact is that there is nothing in the earlier patent case to support the district court and appeals court judgements that the petitioner's claims and issues of fraud, misrepresentation, injurious falsehood, and interference with property and contract rights were adjudicated "on the merits" or "actually litigated, and necessarily determined by a court of competent jurisdiction" in the earlier patent case.

The due process clause entitles petitioner to hearings on the merits so that he can prove that the master, judge,

and non-government respondents fraudulently obtained the judgement in the earlier patent case. The dismissal of the fraud cases against the master and the judge on grounds of absolute judicial immunity and the granting of summary judgement in favor of respondents on grounds of *res judicata* and collateral estoppel deny petitioner a hearing for the determination of fraud claims and issues on their merits and therefore deprive petitioner's liberty and property without due process. The irrebuttable presumptions of absolute judicial immunity, *res judicata*, and collateral estoppel violate the due process clause. Forcing petitioner to give up his patents by irrebutably presuming absolute judicial immunity, *res judicata*, and collateral estoppel in the present fraud cases

deprives petitioner's liberty and property without due process of law.

Vlandis, LaFleur, Coleman, supra.

The granting therefore of corporate appellee's motions for summary judgement on grounds of res judicata and collateral estoppel is arbitrary and capricious because different claims and issues were involved in the fraud and patent cases. Absent the same claims or issues in the two cases, the application of res judicata and collateral estoppel deprive petitioner's liberty and property without due process of law.

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4. Arbitrary Sanctions

Federal Circuit Rule 47.9 provides that "no application will be granted without an opportunity to submit a response". The order for sanctions of the CAFC (A-31) was made without giving petitioner the opportunity to submit a response to appellee's applications for attorney's fees.

Under FRAP 38, the CAFC may award costs and reasonable attorney's fees against a party, where both the Congressional policy and the case law are clearly contrary to the party's position. Monroe Auto Equipment Co. v. NLRB, 511 F2d 611 (CA5 1975), 89 BNA LRRM 2104, 76 CCH LC #10798, 20 FRServ2d 956. However, before assessing sanctions, a court must determine whether the situation is one of those highly unusual instances where the party is guilty of bad faith. West Virginia v. Chas. Pfizer & Co., 440 F2d 1079 (CA2 1971), cert

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den 404 US 871, 30 LEd2d 115, 92 S Ct 81
(disapproved on other grounds Illinois
Brick Co. v. Illinois, 431 US 720, 52 LEd
2d 707, 97 S Ct 2061, reh den 434 US 881,
54 LEd2d 164, 98 S Ct 243); Fluoro Electric
Co. v. Branford Associates, 489 F2d 320
(CA2 1972). There must be a clear showing
of bad faith on the part of the party.
West Virginia supra.

Sanctions are not warranted because
the Congressional policy for the reexami-
nation of patents under 35 USC 302 et seq.
and the case law (see cited cases under
"Fraud", "Judicial Immunity", "Res Judicata/
Collateral Estoppel", supra) are clearly in
favor of petitioner's position. Monroe Auto,
supra.

But even assuming arguendo that
sanctions are indicated, neither the district
court or the court of appeals have shown
bad faith on the part of petitioner.

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In the district court, petitioner filed his claim for fraud in the procurement of the judgement in the earlier patent case on the basis of the two letters by Hillman admitting "I do not have expert qualifications in this or any other technology" and "I would not be qualified to testify as a technology expert", that Hillman knowingly testified as a qualified expert, that Judge Wilson and respondents knew that Hillman was unqualified, that Judge Wilson allowed Hillman to write technical reports and to testify under oath as a technical expert, and that Judge Wilson used Hillman's technical reports and testimony to invalidate petitioner's patents, after petitioner recommended to

the Court (and respondents opposed) the Patent Office procedure under 35 USC 302 et seq. for the reexamination of petitioner's patents and in light of the allegations in the patent complaint that "he cannot afford the payment of substantial attorney's fees". par 146,154,156, prayer Parts X-1,X-2,X-3 2nd amended complaint in patent case (DN 170). These facts, coupled with the failure of the courts below to show bad faith on the part of petitioner preclude the assessment of sanctions. West Virginia, Illinois Brick, Fluoro Electric, supra.

Clearly, the complaint and appeal routes were the only ones available to petitioner to regain his patents which had been taken from him by a judgement procured in fraud. It was not a frivolous act for petitioner to pursue the only legal avenue available to him in order to regain his patent rights. The CAFC cannot

therefore say that petitioner acted in bad faith. In accord with West Virginia, supra, there can be no assessment of sanctions against petitioner without a determination by the CAFC that petitioner acted in bad faith. See also MGA Inc. v. General Motors Corp., 827 F2d 729, 3 USPQ2d 1762 (CAFC 1987) ("it was not frivolous for a patent holder to pursue legal avenues available to it to obtain decision with a delineated legal reasoning, and patent holder did not present an argument without foundation").

Moreover, under FRCP 11 and FRAP 38, fees must be reasonable. In the district court and on appeal, each non-government appellee submitted a separate brief and filed a separate application for briefs, even though the four fraud cases were considered together by the courts below, in violation of their duty to mitigate

expenses. No effort was made by appellees to make their identical arguments, filed separately, in a single brief, and the courts below did not consider the matter. Examination of the footnote at p 4 supra reveals the large variation of fees charged by each appellee for making the same argument, and the double fees for TI on appeal. Clearly, under the inefficient supervision of the courts below, FRCP 11 and FRAP 38 were used as an excuse to run up unjustified large numbers of hours. Gaiardo v. Ethyl, Corp., 835 F2d 479 (CA3 1987); Thomas v. Capital Security Services, Inc., 836 F2d 866 (CA5 1988) (en banc); INVST Financial Group Inc. v. Chem-Nuclear Systems, Inc., 815 F2d 391 (CA6 1987); Frantz v. U.S. Powerlifting Federation, 836 F2d 1063 (CA7 1987); Nassau-Suffolk Ice Cream Inc. v. Integrated Resources Inc., 114 FRD 684 (SNY 1987).

Under FRCP 11, a sanction should take into account equitable factors such as the sanctioned party's ability to pay. Brown v. Federation of State Medical Boards, 830 F2d 1429 (CA7 1987). In this country, the average citizen makes \$25,000 a year and, on average, saves 5% (\$1,250). Any costs and attorney's fees which exceed \$1,250 would be beyond the citizen's ability to pay and are therefore inequitable. Arbitrary sanctions which exceed the average citizen's ability to pay will destroy him economically and therefore go far beyond the intended purpose of the statute which provides the sanction. The situation is compounded when the sanction itself is groundless. *

* Petitioner has filed for bankruptcy

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The granting therefore of sanctions by the courts below is arbitrary and capricious because the Congressional policy (35 USC 302 et seq.) and the case law (2nd, 3rd, 5th, 7th Circuit authorities cited above) clearly support petitioner's position, because the courts below have failed to show any bad faith on the part of petitioner, and because sanctions actually assessed are unreasonable, duplicative and do not take into account petitioner's ability to pay.

5. Due Process and Equal Treatment

The due process clause entitles the petitioner to a hearing so that he can prove that, in fact, the judgement in the patent case was procured by fraud and that sanctions have no grounds under either FRCP 11 or FRAP 38. The irrebuttable presumptions of absolute judicial immunity, res judicata and collateral estoppel, and sanctions based thereon, deprive peti-

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tioner's liberty and property without due process of law. Vlandis, Cleveland Board, Coleman, supra.

Due process under the 5th Amendment also includes protections against denials of equal protection. Bolling v. Sharpe, 347 US 497 (1954). FRAP 38 and FRCP 11 are unreasonable because they arbitrarily and capriciously allow appellee's attorney's fees against pro-se petitioner but do not allow pro-se petitioner's attorney's fees against appellees.

"Attorney Fees. You are not entitled to payment for your own services in pursuing your case pro se, because only an attorney may be awarded attorney's fees". Federal Circuit Informal Rule 17 p 77 Rules of Practice CAFC

But, even if FRAP 38 and FRCP 11 are reasonable rules, the First Amendment guarantees to petitioner the fundamental right to petition the Government for a

redress of grievances. The Government makes its courts available for the purpose of airing grievances. However, in the courts, attorney's fees are available to appellees who have enough money to hire attorneys. Attorney's fees are not available to petitioner who does not have enough money to hire attorneys. This is a clear denial of equal treatment.

The order for sanctions of the CAFC (A-29, A-33) was made without giving petitioner the opportunity to submit a response to appellee's applications for attorney's fees, without determinations by the CAFC whether the Congressional policy and the case law clearly favor sanctions, whether petitioner acted in bad faith, and whether appellee's fees were reasonable. The order for sanctions of the district court (B-1 et seq.) was made without that court's determination

of petitioner's ability to pay. * Sanctions therefore violate the due process clause. Because FRCP 38 and FRCP 11 treat appellees and petitioner differently, they deny equal protection.

6. Fiat Ruat Justicia

The case was decided by the district court on the government's motion to dismiss on grounds of absolute immunity and on the corporate defendant's motion for summary judgement on grounds of res judicata and collateral estoppel.

For purposes of ruling on the government's motion, the district court assumed that the master and judge were absolutely immune as a matter of law. This

* The issue was raised in petitioner's opposition to respondent's request for attorneys fees filed 1/8/88 at page 6 ("plaintiff cannot afford the attorneys fees . ."). See paragraphs 146, 154, 156 and Parts X-1, X-2, X-3 in complaint of earlier patent case in which petitioner alleges and prays for relief because "he cannot afford the payment of substantial attorneys fees".

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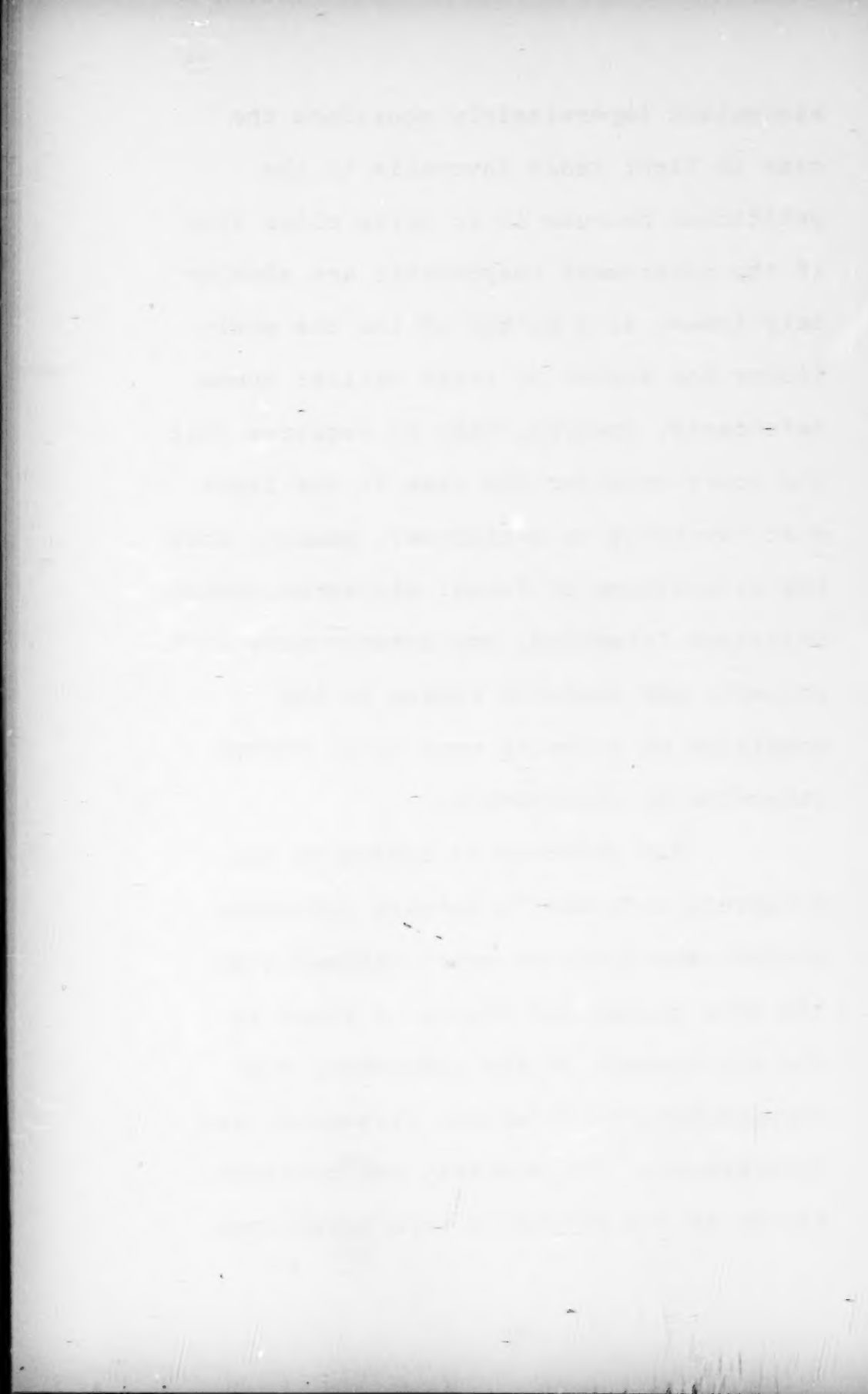
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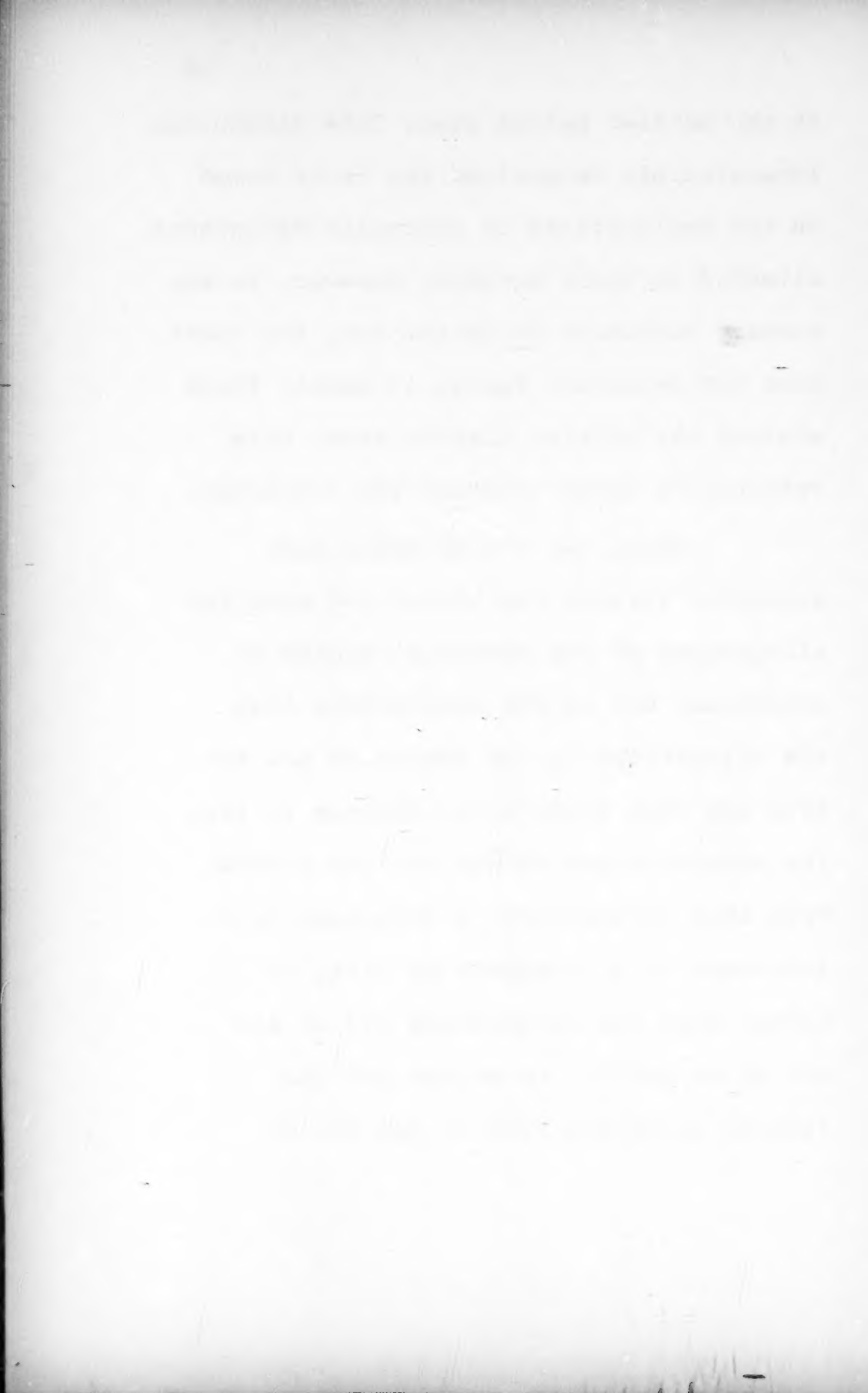
assumption impermissibly considers the case in light least favorable to the petitioner because it is quite clear that if the government respondents are absolutely immune as a matter of law the petitioner has stated no claim against these defendants. However, FRCP 12 requires that the court consider the case in the light most favorable to petitioner, namely, that the allegations of fraud, misrepresentation, injurious falsehood, and interference with property and contract rights in the complaint be taken as true until proven otherwise by respondents.

For purposes of ruling on the corporate defendant's summary judgment motion, the district court assumed that the same claims and issues of fraud in the procurement of the judgement, misrepresentation, injurious falsehood, and interference with property and contract rights in the complaint were determined



in the earlier patent case. This assumption impermissibly determined the facts based on the declarations of corporate defendants attached to their motions. However, in any summary judgement determination, the court does not determine facts, it merely finds whether the parties dispute them. Here, respondents never answered the complaint.

Thus, the courts below made sanctions against petitioner not upon the allegations of the complaint signed by petitioner but on the assumptions that the allegations in the complaint are not true and that there is no dispute to try. The complaint was thrown out the window. From this perspective, a judgement is a judgement is a judgement by fiat, no matter what the respondents did or did not do to get it, no matter how the federal rules are used to get it, no



matter that absolute judicial immunity is not always absolute, and no matter that there are genuine issues of material fact to be tried.

Indeed, the orders for sanctions (A-29,A-33,B-1 et seq.) say, first, that they are authorized without giving petitioner his day in court, second, that they are authorized even when they infringe petitioner's constitutional rights and, third, that the less you are worth, the more you're going to be sanctioned.

First, the sanctions awards were entered after petitioner's complaint was dismissed on grounds of absolute immunity and after summary judgement was granted on grounds of res judicata and collateral estoppel. Sanctions were based not upon the facts and law in the complaint signed by petitioner but upon the court's second guessing what facts and law the petitioner

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should have considered in making his complaint. Thus, respondent's victory is diminished by at least two significant factors: on the merits (which were never tried; respondents do not recover money on the merits), and the award is based on the court's second guessing (of what petitioner should or should not have done under FRCP 11 and FRAP 38; respondents recover money on basis of papers signed by respondents not on the basis of any paper signed by petitioner). Clearly, sanctions are designed to give the courts below powers to second guess what petitioner should have considered in making his complaint, rather than being (as they should be) the product of a full and fair adjudication that hands the respondents a victory on the merits.

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Second, sanctions violate petitioner's First Amendment right to petition the government (when fraud in the administration of justice is involved), and sanctions violate petitioner's Fifth amendment rights (to earn a living as an inventor; to prevent the seizure of his patents through fraud in the procurement of judgements; to obtain a determination of issue under 35 USC 303; to prove the alleged fraud in the procurement of the judgement on merits; to have a chance to submit a response to respondent's applications for sanctions; and for equal protection under FRCP 11 and FRAP 38).

Third, the total sanctions against petitioner (\$103,465) amount to 4 years of an average citizen's earnings (\$25,000/yr) or 83 years of his average savings (\$1,250/yr). Petitioner is unaware of any sanctions against a corporation which amounts to 4

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years of the corporation's gross sales or 83 years of the corporation's profits. Thus, assuming that FRCP 11 and FRAP 38 are reasonable rules (they are not) and that sanctions are warranted (they are not), FRCP 11 and FRAP 38 treat petitioner and respondents differently, based on a party's worth, and therefore deny petitioner's equal protection.

The district and appeals court judges make their own rules, by fiat, ruat justicia.

CONCLUSION

The petition should be granted because the court of appeals decision is in conflict with the decisions of other courts of appeals, and with the applicable decisions of this Court, on the same matter and because the court of appeals has so far sanctioned a departure from the usual proceedings as to call for an exercise of this Court's power of supervision.

years of the corporation's gross sales or
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The district and appeals courts have

made their own interpretation of the law.

CONCLUSION

The petition should be granted.

Because the court of appeals has

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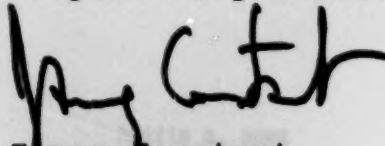
authority to decide the case.

Therefore, it is called for an order of

the court of appeals.

For the foregoing reasons, petitioner James Constant respectfully requests that a writ of certiorari issue to review the order for sanctions of the United States Court of Appeals for the Federal Circuit attached as APPENDIX A-31.

Respectfully submitted



James Constant
1603 Danbury Dr
Claremont, CA 91711
(714) 624-1801

pro se petitioner

For the foregoing reasons, petitioner

seeks Council membership to allow him


a right of participation in the

order for execution of the United States

Court of Appeals for the Second Circuit

attached as Appendix A-1.

Respectfully submitted,



J. Edgar Hoover
1201 G Street, N.E.
Washington, D.C. 20535
(202) 456-4000

cc: as requested

CERTIFICATE OF SERVICE

I certify that the foregoing
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT and APPENDIX were
served on all parties by mailing first
class three (3) true copies to each of
them on 11 September, 1989 addressed
as follows:

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UNITED STATES ATTORNEY
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LOS ANGELES, CA 90012

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SPENCLEY NORN JURAS & LUBITZ
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LOS ANGELES, CA 90071

TESTIMONY OF SERVICE

I certify that the following

petition for writ of habeas corpus in the

United States Court of Appeals for the

Second Circuit and Atlantic were

received on all parties by mailing filed

class before 11:00 a.m. on each of

them on 11 September, 1955 respectively

as follows:

THOMAS J. BROWN
JAMES H. BROWN
JAMES H. BROWN
JAMES H. BROWN
JAMES H. BROWN

THOMAS J. BROWN
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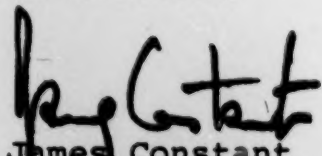
THOMAS J. BROWN
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JAMES H. BROWN

Barbara Herwig/R. Rasmussen
Dept of Justice, Civil Division
Appellate Staff
10th & Penn Ave., NW Rm 3631
Washington, D.C. 20530

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare under penalty of
perjury that the foregoing is true
and correct.

Executed on 11 September,
1989 at Claremont, California.


James Constant
1603 Danbury Dr
Claremont, CA 91711
(714) 624-1801

pro se petitioner